

FCC MAIL SECTION

Before the
FEB 5 11 24 AM '97 FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 97M-14

70691

In re Applications of	)	WT DOCKET NO. 96-41	
)		
LIBERTY CABLE CO., INC.)		
)		
For Private Operational Fixed	)	File Nos:	
Microwave Service Authorization	)	708777	WNTT370
and Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
	)	713300	(NEW)
	)	717325	(NEW)

ORDER

Issued: February 3, 1997 ; Released: February 5, 1997

On January 31, 1997, a certified true copy of a letter dated April 20, 1993, from Janet L. Richter of Pepper & Corazzini to Bruce McKinnon of Liberty Cable Co., Inc. ("Liberty") was submitted by Liberty for in camera review. Order FCC 97M-13, issued January 29, 1997.¹ The letter contains legal advice to Liberty concerning Commission practice in the processing of microwave applications and STAs as of the date of the letter. The letter also contains advice on how Liberty should conduct its business in a manner that, in counsel's opinion, would comply with the Commission's rules on activations. There are no specific facts which could be meaningfully disclosed independent of the advice. Nor does the advice relate to any specific transaction(s).² In view of the general assertion by Liberty that the activations were unintended mistakes, the letter is relevant to knowledge and intent. There appears to have been a waiver of the privilege by virtue of the testimony heard in this case.

¹ Copies were received simultaneously from the law firms of Pepper & Corazzini and Constantine & Partners.

² In the absence of advice sought on specific transaction(s), there is a lesser concern for disclosure under assertion of the privilege.

The subject of the letter is : "Re: Construction and Operation of New Microwave Paths." A "cc" (copy) of the letter was directed to Behrooz Nourain. The first sentence of the letter recites:³

Behrooz Nourain and I have had several discussions recently regarding when it is permissible for Liberty to construct and operate new microwave paths and stations, and when it is not.

The letter then gives specific advice on what should and should not be done in the timing of activations of new microwave paths that are the subject of license applications. There is ultimate advice communicated to Mr. McKinnon and Mr. Nourain that operation is only permissible when the FCC had granted authorizations.

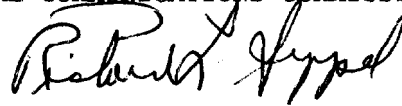
There was testimony elicited about the advice that Mr. Nourain was (or was not) receiving from Mr. Lehmkuhl on the timing of microwave path activations. There also was testimony elicited from Mr. Lehmkuhl on the subject. (Hearing Tr. 1074.) Nourain testified on direct that he had no responsibility for licensing; the responsibility for licensing/STAs was Pepper & Corazzini's. (Hearing Tr. 628.) But Nourain did not ask for advice from counsel before activations. (Hearing Tr. 706.) Nourain's testimony leaves the impression that he was acting in an unsupervised vacuum. Yet the letter of April 1993, was, to the contrary, providing a specific regimen of advice on lawful activations. Under the facts of this case, there has been a waiver. Liberty permitted Nourain to activate paths without any supervision. Nourain's testimony seeks to convince that the responsibility for compliance was Pepper & Corazzini's, not Liberty's and certainly not his. There appeared to be no set instructions on how Nourain should comply with the law in activating paths. Yet in April 1993, Pepper & Corazzini had written a specific cautionary instruction that provided instructions on compliance. A copy of the letter was sent to Mr. Nourain. Therefore, Mr. Nourain was not acting in a legal advisory vacuum as the testimony of Mr. Nourain would indicate.

Because privileges impede and obscure the search for truth, they are not favored in the law and are to be narrowly construed. U.S. v. Suarez, 820 F. 2d 1158, 1160 (11th Cir. 1987). See also WWOR, TV, 4 F.C.C. Rcd 7509 n.1 (Review Bd 1989). Based on the testimony on communications between Mr. Nourain and Mr. Lehmkuhl on the advice (or the absence of advice) with respect to STAs, licensing and activating paths, Liberty, through its agent, has waived the privilege "as to all other communications relating to the same subject matter." In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982). Cf. Welch Communications, Inc., 4 F.C.C. Rcd 3979 (Review Bd 1989).

³ The first sentence of the letter merely identifies the subject matter of the privileged material. Nemet v. Hyundai, 1989 WL 18728 (EDNY) (mere fact that subject matter was discussed in confidence does not protect a document).

Accordingly, IT IS ORDERED that copies of the letter dated April 20, 1993, from Jennifer L. Richter to Bruce McKinnon SHALL BE PRODUCED to all counsel by 12 noon on February 4, 1997.

FEDERAL COMMUNICATIONS COMMISSION⁴

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over the typed name.

Richard L. Sippel
Administrative Law Judge

⁴ Copies of this Order were faxed or e-mailed in the p.m. of the date of issuance.